

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Gregory Harold and Sandra Kay Johnson,**

**Chapter 7**

**Debtor(s).**

**BK 04-34323 DDO**

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**NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE**

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TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion at 9:30 A.M. on November 4, 2004, in Courtroom No. 228 A, at the United States Bankruptcy Court, United States Courthouse, at 316 N. Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than November 1, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than October 26, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: \_\_\_\_\_

CLERK OF BANKRUPTCY COURT

By: \_\_\_\_\_  
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

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**NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)**

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TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 9:30 A.M. on November 4, 2004, in Courtroom No. 228 A, at the United States Bankruptcy Court, United States Courthouse, at 316 N. Robert Street, in St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than November 1, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than October 26, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1. UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding

is a core proceeding. The petition commencing this Chapter 7 case was filed on July 26, 2004. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtors, it appears that they have the ability to pay a substantial portion of their dischargeable debt without hardship.

7. The debtors list the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtors list three claims totaling \$ 79,438.00 secured by 1999 Blazer, 1994 S-10 pickup and a mortgage on the homestead.
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors list two claims totaling \$ 16,217.00.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors list sixty claims totaling \$ 67,432.00.

8. The debts listed in the debtors' Schedule of Liabilities appear to be primarily consumer debt. *See* Debtors' Schedule F. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

9. On Schedule I, the debtors list monthly net income of \$ 3,791.00.

10. On Schedule J, the debtors list monthly expenses of \$ 2,447.00.

11. Average net monthly income of \$ 3,791.00 less monthly expenses of \$ 2,447.00 provides the debtors with monthly disposable income of \$ 1,344.00.

12. Monthly disposable income of \$ 1,344.00 would enable the debtors to pay

approximately \$ 48,384.00 or 57 % of the unsecured creditors (Schedule E + Schedule F) in a hypothetical thirty six month Chapter 13 plan. The debtors can pay approximately \$ 80,640.00 or 96 % of the unsecured creditors (Schedule E + Schedule F) in a hypothetical sixty month Chapter 13 plan.

13. The debtor, Mr. Johnson, is currently employed, and there does not appear to be any likelihood that his employment will be terminated at any time in the future. The co-debtor, Ms. Johnson, receives monthly social security income.

14. The debtors have the ability to repay a substantial portion of their general unsecured debt and there appears to be no reason for their unwillingness to do so.

15. Pursuant to the authority of Federal Rule 1017(e)(1), the United States Trustee requests that the following documents be provided at or prior to the hearing on this motion:

- a. Copies of last three pay stubs for the debtor, Mr. Johnson, and statements for last three months of social security income for Ms. Johnson.
- b. Copies of the 2002 and 2003 state and federal tax returns, including attachments (W-2s).
- c. Provide any documentation showing that any reduction for retirement is mandatory (if nothing is submitted, the United States Trustee shall assume that it is a voluntary contribution).
- d. To the extent that the debtors argue that their Schedule J, which was prepared under penalty of perjury, is not accurate, three months of receipts, statements or other proof of any new or omitted expense.

15. As an alternative to dismissal, the United States Trustee does not oppose voluntary conversion of this case to Chapter 13.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be dismissed.

Dated: October 7, 2004

Respectfully submitted,

HABBO G. FOKKENA  
United States Trustee  
Region 12

By: /s/ Sarah J. Wencil  
Sarah J. Wencil  
Trial Attorney  
United States Trustee's Office  
1015 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
IA ATTY No. 14014  
(612) 664-5500

### **VERIFICATION**

I, Sarah J. Wencil, trial attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: October 7, 2004

Signed: /s/ Sarah J. Wencil  
Sarah J. Wencil  
Trial Attorney

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

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The United States Trustee submits this memorandum in support of his motion to dismiss this case under 11 U.S.C. § 707(b). *See* Local Rule 9013-2(a).

**Analysis**

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make charitable contributions (that meet the definition of ‘charitable contribution’ under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4).

11 U.S.C. § 707(b) (1994) (as amended by Religious Liberty and Charitable Donation Protection Act of 1998). The United States Trustee bears the burden of showing substantial abuse. *In re Dubberke*, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

**(1) The Debtor's Debts Are Primarily Consumer Debts.**

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debts listed on Schedule F are primarily consumer debts. The debtors checked on the Petition that the nature of the debts are consumer/non-business. None of the debts listed on Schedule F are designated as business debts.

**(2) The Granting of Relief under Chapter 7 Constitutes  
Substantial Abuse of Chapter Seven of the Bankruptcy Code.**

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988); *United States Trustee v. Harris*, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United*



*States*, 974 F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

While bad faith on the part of the debtor may constitute substantial abuse under Section 707(b), bad faith is not required to be shown to satisfy the "substantial abuse" standard when the debtor is otherwise able to repay his or her debts out of future income:

This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

*Walton*, 866 F.2d at 985 (quoting *In re Kelly*, 841 F.2d at 914-15); *Harris*, 960 F.2d at 76 (stating that "egregious behavior" by the debtor is not a necessary element for a Chapter 7 case to be dismissed under Section 707(b)). While the unique hardships and the good faith of the debtor are relevant factors, those factors are not as important as the ability of the debtor to fund a Chapter 13 plan. *Walton*, 866 F.2d at 983; *see also Harris*, 960 F.2d at 77 (rejecting the "totality of the circumstances" test espoused by the Fourth Circuit Court of Appeals in *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991), in favor of examining whether a debtor may fund a Chapter 13 plan out of future income).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not a relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13 petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of

amended schedules when the amendments are offered after a Section 707(b) motion is filed and the amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In the District of Minnesota, there is no set percentage of repayment that must be met for substantial abuse to be present. The District Court of Minnesota opines that the determination of what is substantial should be made on a case-by-case basis:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See *Walton*; *Fonder*; see also *In re Schmidt*, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a *de novo* review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

*Mathes v. Stuart (In re Mathes)*, Civil File No. 3-96-906, slip op. at 6-7 (D. Minn. July 2, 1997)  
*See also In re Shirley Wilkins*, 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997) (Kishel, J.)  
(holding that the ability to pay 28% in three years or 49% in five years of unsecured debts was a substantial abuse under § 707(b)).

In the present case, the debtors have the ability to pay approximately \$ 48,384.00 or 57 % of the unsecured creditors (Schedule E + Schedule F) in a hypothetical thirty six month Chapter 13 plan. The debtors can pay approximately \$ 80,640.00 or 96 % of the unsecured creditors (Schedule E + Schedule F) in a hypothetical sixty month Chapter 13 plan. The ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: October 7, 2004

Respectfully submitted,

HABBO G. FOKKENA  
United States Trustee  
Region 12

By: /s/ Sarah J. Wencil  
Sarah J. Wencil  
Trial Attorney  
United States Trustee's Office  
1015 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
IA ATTY No. 14014  
(612) 664-5500

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**CERTIFICATE OF MAILING**

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I, Emily Rohr, certify under penalty of perjury that I am an employee in the Office of the United States Trustee for the District of Minnesota and am a person of such age and discretion as to be competent to serve papers.

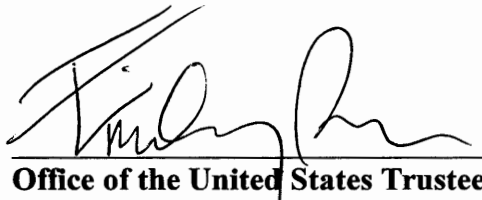
That on October 7, 2004, I served a copy of the Proposed Notice of Hearing, Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law in Support of Motion to Dismiss; and proposed Order in the above-referenced case by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

**Addressee(s):**

Gregory Harold and Sandra Kay Johnson  
RR1 Box 115  
Ellsworth, MN 56129

Stephen P. Thies  
P O Box 4  
Redwood Falls, MN 56283

Charles W. Ries  
Maschka Riedy & Ries Law Firm  
Union Square Business Center, Suite 200  
201 North Broad Street  
P O Box 7  
Mankato, MN 56002-0007

  
**Office of the United States Trustee  
Emily Rohr**

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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**ORDER**

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At St. Paul, Minnesota, the \_\_\_\_\_ day of \_\_\_\_\_, 2004, the United States Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) came before the Court for hearing.

Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

**IT IS HEREBY ORDERED:**

That the Chapter 7 bankruptcy case filed by the above-captioned debtors is dismissed pursuant to 11 U.S.C. Section 707(b).

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The Honorable Dennis D. O'Brien  
United States Bankruptcy Judge